

ORAL ARGUMENT NOT YET SCHEDULED
Case No. 24-1119 (and consolidated cases)

**United States Court of Appeals
For the District of Columbia Circuit**

STATE OF NORTH DAKOTA, STATE OF WEST VIRGINIA, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

On Petition for Judicial Review of Final Agency Actions of the United States
Environmental Protection Agency, 89 Fed. Reg. 38508 (May 7, 2024)

**JOINT PROPOSED BRIEFING
FORMAT AND SCHEDULE**

Pursuant to this Court's Order dated August 6, 2024, the parties to the above action, *State of North Dakota, et al. v. EPA*, Case No. 24-1119 and consolidated case numbers 24-1154, 24-1179, 24-1184, 24-1190, 24-1194, 24-1201, 24-1217, and 24-1223 have conferred on a proposed briefing schedule and format. Petitioners, Petitioner-Intervenor, Respondent, and Respondent-Intervenors have agreed on a proposed briefing schedule and format.

Given the number of parties involved and the complexity of the issues to be briefed, the Parties agree that an extension of the standard word allotment is

appropriate to fully and fairly litigate this matter. Accordingly, the Parties jointly request that the Court enter the following schedule:

| Filing | Date Due | Word Limit |
|---|-------------------|--|
| Petitioners' Opening Briefs | October 1, 2024 | 24,000 words total, divided into up to two briefs at Petitioners' discretion |
| Petitioner-Intervenor's Opening Brief | October 8, 2024 | 8,400 words |
| Respondent's Answering Brief | November 12, 2024 | 24,000 words |
| Respondent-Intervenors' Answering Briefs | November 19, 2024 | 16,800 words divided into up to 2 briefs at Respondent-Intervenors' discretion |
| Petitioners' Reply Briefs | November 26, 2024 | 12,000 words total, divided into up to two briefs at Petitioners' discretion |
| Petitioner-Intervenors' Reply Brief | December 3, 2024 | 4,200 words |
| Deferred Appendix | December 6, 2024 | |
| Final Briefs | December 10, 2024 | |

These consolidated cases challenge the United States Environmental Protection Agency's (EPA's) National Emission Standards for Hazardous Air Pollutants: Coal-and Oil-Fired Electric Utility Steam Generating Units Review of Residual Risk and Technology Review, 89 Fed. Reg. 38508 (May 7, 2024) (the Rule). The cases involve 23 state petitioners, 10 industry petitioners, one petitioner-

intervenor, respondent EPA, and 36 respondent-intervenors composed of 18 associations and 18 states and cities. EPA's 648-page Index of the Administrative Record includes over 5,800 documents. *See* EPA's Notice of Filing of Certified Index to the Administrative Record (June 24, 2024) (Doc. ID No. 2061181).

Petitioners expect to raise a number of issues, including statutory interpretation questions and arguments concerning technical topics relating to power grid reliability, the efficacy of the original MATS Rule, the Rule's costs and benefits, and other complex topics meriting thorough and detailed discussion. The proposed expanded word allotments will allow the Parties to comprehensively discuss the technical topics that underpin the Rule while also allowing the various parties space to explain party-specific issues.

Despite the number of parties, complexity of the issues, and size of the administrative record, the Parties' proposed word count totals less than two standard briefs in the aggregate for the principal briefs of the Petitioners and EPA. The proposed aggregate word count of the Respondent-Intervenors is equivalent to the 70% allocation provided under D.C. Cir. Rule 32(e)(2)(b). The proposed word count of the Petitioner-Intervenor's principal brief is 50% of the aggregate allocation for the Respondent-Intervenors. And the proposed word counts for the reply briefs of Petitioners and Petitioner-Intervenors are 50% of their respective principal briefs,

consistent with the proportion in D.C. Cir. Rule 32(e)(2)(B) and Fed. R. App. P. 32(a)(7)(B)(ii).

These proposed word counts are analogous to the word counts the Court has permitted for other complex litigation of national importance under the Clean Air Act and are shorter than some word counts permitted for other Clean Air Act litigation. For example, in Clean Air Act litigation over the Biden Administration's power plant greenhouse gas rule, the Court recently permitted principal briefs up to 32,000 words in the aggregate, with 16,000 words in the aggregate for reply. *See West Virginia et al. v. EPA*, No. 24-1120 (Order dated Aug. 9, 2024) (Doc. No. 2069206). Similarly, to litigate petitions for review of the "Affordable Clean Energy Rule" – another CAA rulemaking – this Court authorized 52,800 words across four Petitioners' briefs, 52,800 words for Respondents, and 26,400 across four reply briefs. *See Am. Lung Ass'n v. EPA*, No. 19-1140 (Order dated Jan. 31, 2020) (Doc. No. 1826621). And in the "Clean Power Plan" litigation, the Court permitted 42,000 words for principal briefs and 21,000 words for reply. *See West Virginia v. EPA*, No. 15-1363 (Order dated Jan. 28, 2016) (Doc. No. 1595922).

The Court's authorization of an extended word count is warranted here for the same reasons that it was warranted in the aforementioned cases: Clean Air Act litigation is often highly complex, and when many petitions for review are

consolidated, as they are here, the parties require additional briefing space in order to adequately raise and respond to all relevant arguments.

Additionally, Petitioners reserve the right to move for Respondent to supplement the record or produce limited documents in discovery. EPA's position is that discovery is inappropriate in this record-review case. But the parties will attempt to narrow any records dispute and endeavor to brief any such motions on a timeline that permits for prompt resolution.

The Parties respectfully request that the Court enter the jointly proposed schedule and format for briefing these consolidated cases.

DATE: AUGUST 20, 2024

PATRICK MORRISEY
Attorney General

/s/ Michael R. Williams

MICHAEL R. WILLIAMS
Solicitor General
Office of the Attorney General of West
Virginia
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25301
(304) 558-2021
michael.r.williams@wvago.gov

Counsel for State of West Virginia

DREW H. WRIGLEY
Attorney General

/s/ Philip Axt

PHILIP AXT
Solicitor General
600 E Boulevard Ave., Dept. 125
Bismarck, ND 58505
Phone: 701.328.2210
pjaxt@nd.gov

NESSA HOREWITCH COPPINGER
DAVID M. FRIEDLAND
Special Assistant Attorneys General
1900 N Street NW, Suite 100
Washington, DC 20036
ncoppinger@bdlaw.com
dfriedland@bdlaw.com

Counsel for State of North Dakota

On Behalf of State Petitioners in No. 24-1119

/s/ Charles T. Wehland

Charles T. Wehland

JONES DAY

110 North Wacker Drive, Suite 4800

Chicago, IL 60601-1692

Tel: (312) 269-4388

ctwehland@jonesday.com

Yaakov Roth

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

Tel: (202) 879-7658

yroth@jonesday.com

Jeffery D. Ubersax

KUSHNER & HAMED CO., LPA

1375 East Ninth Street, Suite 1390

Cleveland, OH 44114

Tel: (216) 696-6700

jdubersax@kushnerhamed.com

/s/ Elizabeth C. Williamson

ELIZABETH C. WILLIAMSON

Counsel of Record

BALCH & BINGHAM LLP

601 Pennsylvania Ave. N.W.

Suite 825 South

Washington, D.C. 20004

(202) 661-6342

(202) 347-6001 (fax)

ewilliamson@balch.com

/s/ Misha Tseytlin

MISHA TSEYTLIN

Counsel of Record

TROUTMAN PEPPER

HAMILTON SANDERS LLP

227 W. Monroe Street

Suite 3900

Chicago, IL 60606

(608) 999-1240 (MT)

(312) 759-1939 (fax)

misha.tseytlin@troutman.com

/s/ Megan Berge

Megan H. Berge

BAKER BOTTS L.L.P.

700 K Street, NW

Washington, D.C. 20001

Phone: (202) 639-1308

megan.berge@bakerbotts.com

Counsel for Petitioner in No. 24-1154

Counsel for Petitioners in No. 24-1179

/s/ C. Grady Moore III

C. Grady Moore III
P. Stephen Gidiere III
Julia B. Barber
BALCH & BINGHAM LLP
1901 6th Ave. N., Ste. 1500
Birmingham, Alabama 35203
205-251-8100
gmoore@balch.com

Counsel for Petitioner in No. 24-1184

/s/ Joshua B. Frank

Joshua B. Frank
C. Joshua Lee
BAKER BOTTS L.L.P.
700 K Street N.W.
Washington, D.C. 20001
Tel.: (202) 639-7748
(202) 639-1130
joshua.frank@bakerbotts.com
joshua.lee@bakerbotts.com

Counsel for Petitioner in No. 24-1190

/s/ Creighton R. Magid

Creighton R. Magid #49713
DORSEY & WHITNEY LLP
1401 New York Avenue NW
Suite 900
Washington, D.C. 20005
Telephone: (202) 442-3555
Fax: (202) 315-3852
magid.chip@dorsey.com

Counsel for Petitioner in Nos. 24-1190, 24-1217

/s/ Mark W. DeLaquil

Mark W. DeLaquil
Andrew M. Grossman
Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036
Tel: (202) 861-1527
mdelaquil@bakerlaw.com

Counsel for Petitioner in No. 24-1194

/s/ Makram B. Jaber

Makram B. Jaber
Allison D. Wood
Aaron M. Flynn
MCGUIRE WOODS LLP
888 16th Street N.W., Suite 500
Black Lives Matter Plaza
Washington, DC 20006
(202) 857-1700
mjaber@mcguirewoods.com
awood@mcguirewoods.com
aflynn@mcguirewoods.com

Counsel for Petitioner in No. 24-1201

/s/ David M. Flannery

David M. Flannery
Kathy G. Beckett
Keeleigh S. Huffman
Steptoe & Johnson PLLC
707 Virginia Street, East
Post Office Box 1588
Charleston, WV 25326
(304) 353-8000
Dave.Flannery@steptoe-johnson.com
Kathy.Beckett@steptoe-johnson.com
Keeleigh.Huffman@steptoe-
johnson.com

Edward L. Kropp
Steptoe & Johnson PLLC
PO Box 36425
Indianapolis, Indiana 46236
317-946-9882
Skipp.Kropp@steptoe-johnson.com

Counsel for Petitioner in No. 24-1223

/s/ Jennifer Freel

Jackson Walker LLP

Jennifer Freel

Michael J. Nasi

Cody Lee Vaughn

100 Congress Avenue, Suite 1100

Austin, Texas 78701

[Tel.] (512) 236-2222

[Fax] (512) 391-2194

jfreel@jw.com

mnasi@jw.com

cvaughn@jw.com

*Counsel for Petitioner-Intervenor San
Miguel Electric Cooperative, Inc.*

Todd Kim
Assistant Attorney General

/s/ Redding Cofer Cates

Sue Chen
Redding Cofer Cates
U.S. Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
202-514-2617
redding.cates@usdoj.gov

Counsel for Respondent EPA

FOR THE COMMONWEALTH OF
MASSACHUSETTS

ANDREA JOY CAMPBELL
Attorney General

/s/ Julia Jonas-Day

JULIA JONAS-DAY
Assistant Attorney General
TRACY TRIPLETT
Senior Enforcement Counsel
Energy and Environment Bureau
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2431
Tracy.Triplett@mass.gov
Julia.Jonas-Day@mass.gov

FOR THE STATE OF MINNESOTA

KEITH ELLISON
Attorney General

/s/ Peter Surdo

PETER SURDO
Special Assistant Attorney General
Office of the Attorney General
445 Minnesota Street
Town Square Tower Suite 1400
Saint Paul, MN 55101
(651) 757-1061
Peter.Surdo@ag.state.mn.us

On Behalf of All State and Municipal Respondent-Intervenors

/s/ Sean H. Donahue

Sean H. Donahue

Keri Davidson*

Donahue, Goldberg & Herzog

1008 Pennsylvania Ave., SE

Washington, DC 20003 (202) 277-7085

sean@donahuegoldberg.com

* Not admitted in District of Columbia

/s/ Hayden W. Hashimoto

Shaun A. Goho

Hayden W. Hashimoto

Clean Air Task Force

114 State Street, 6th Floor

Boston, MA 02109

617-624-0234

sgoho@catf.us

hhashimoto@catf.us

Surbhi Sarang

Richard Yates

Vickie Patton

Environmental Defense Fund

2060 Broadway, Ste. 300

Boulder, CO 80302

(303) 440-4901

ssarang@edf.org

ryates@edf.org

vpatton@edf.org

Counsel for Environmental Defense Fund

Counsel for Alliance of Nurses for Healthy Environments, Citizens for Pennsylvania's Future, Clean Wisconsin, Natural Resources Council of Maine, and the Ohio Environmental Council

/s/ Deborah M. Murray

Deborah M. Murray
Spencer Gall
Southern Environmental Law Center
120 Garrett Street, Ste. 400
Charlottesville, VA 22902
(434) 977-4090
dmurray@selcva.org
sgall@selcva.org

*Counsel for American Academy of
Pediatrics, American Lung
Association, American Public Health
Association, and Physicians for Social
Responsibility*

/s/ John D. Walke

John D. Walke Emily K. Davis Natural
Resources Defense Council
1152 15th Street NW, Suite 300
Washington, D.C. 20005 (202) 289-
6868 jwalke@nrdc.org
edavis@nrdc.org

*Counsel for Natural Resources Defense
Council*

/s/ Sanjay Narayan

Sanjay Narayan
Sierra Club
Environmental Law Program
2101 Webster St., Ste 1300
Oakland, CA 94612
(415) 977-5769
sanjay.narayan@sierraclub.org

Counsel for Sierra Club

/s/ Kevin Breiner

Kevin Breiner
Hana Vizcarra
Earthjustice
1001 G Street NW, Suite 1000
Washington, DC 20001
202-797-5239
hvizcarra@earthjustice.org
kbreiner@earthjustice.org

*Counsel for Air Alliance Houston,
Chesapeake Climate Action Network,
Clean Air Council, Downwinders at
Risk, Environmental Integrity Project,
Montana Environmental Information
Center, and Sierra Club*

CERTIFICATE OF COMPLIANCE

The foregoing Joint Proposed Briefing Format and Schedule complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) and Circuit R. 27, because it contains 794 words, excluding those parts of the motion exempted by Fed. R. App. P. 32(f). I further certify that the foregoing also complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared using Microsoft Word 365 in 14-point proportionally spaced Times New Roman font.

Respectfully submitted,

/s/ Philip Axt

PHILIP AXT

Solicitor General of North Dakota

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2024, the foregoing JOINT PROPOSED BRIEFING FORMAT AND SCHEDULE was served electronically on all registered counsel through the Court's CM/ECF system.

/s/ Philip Axt

PHILIP AXT

Solicitor General of North Dakota